United States District Court
For The District of Wyoming

BIODIVERSITY CONSERVATION ALLIANCE, Petitioner, vs. BUREAU OF LAND MANAGEMENT, a Bureau within the Department of Interior; JOHN RUHS, BLM High Desert District Manager, in his official capacity, Respondents,	Civil No. 12-CV-252-S

ORDER GRANTING PETITIONER'S MOTION TO SUPPLEMENT AND AMEND THE ADMINISTRATIVE RECORD

This matter comes before the Court on Petitioner's Motion to Supplement and Amend the Administrative Record, the Court, having carefully considered the Motion, Response, and Reply thereto, and being fully advised in the premises, FINDS:

1. This case originally comes before the Court on Petitioner, Biodiversity Conservation Alliance's ("BCA"), Petition for Review of Respondent, Bureau of Land Management's ("BLM"), decision to authorize the Lost Creek In-Situ Uranium Recovery Project ("the Project"), a uranium mining project north of Wamsutter, Wyoming. BCA asserts the BLM violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the

Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq*.; and therefore the decision to approve and authorize implementation of the Project was arbitrary, capricious, an abuse of discretion, not in accordance with the law, and undertaken without proper observance of procedure required by law pursuant to the Administrate Procedure Act. 5 U.S.C. § 704. Petitioner seeks relief from the Court including vacating the challenged decision and underlying documents supporting the decision, and permanent injunctive relief prohibiting Respondents from implementing the decision pending compliance with federal law.

2. In the instant Motion, Petitioner requests to supplement and amend the administrative record. Petitioner requests the record include thirteen documents that are BLM or interior-produced relating to the management of the three species at issue in the case, or are leading scientific studies related to these species. Petitioner also requests the record include the report by Douglas A. Keinath and Gary Beauvais, Wyoming Pocket Gopher (*Thomomys clusius*): A Technical Conservation Assessment, Wyoming Natural Diversity Database University of Wyoming (Aug. 31, 2006) ("the Report"). Petioner also seeks to remove documents in the submitted record that post-date the October 5, 2012 ROD and thus could not have been before the BLM decision-maker when issuing the ROD.

Petitioner argues the Court should supplement the record to include the proposed documents because BLM failed to consider them properly. Specifically the Petitioner argues, the Report was cited and relied upon in the public comments submitted to the BLM as part of the agency decision making process including BCA's comments on the draft environmental impact statement ("EIS"). Petitioner concedes that the BLM did not consider the Report when it prepared the final environmental impact statement or the ROD, however, Petitioner argues this does not mean it can be excluded from consideration by this Court. With regards to the documents dated after the ROD, Petitioner argues they should be removed because they could not have been considered by BLM when it made the challenged decision.

3. Respondent, the BLM, partially opposes Petitioner's Motion to supplement and amend the Administrative Record. As indicated in Respondent's brief, Respondent-Intervenors—State of Wyoming, Ur-Energy USA Inc., and Lost Creek ISR, LLC—join in Respondent's Response. Respondent does not object to the Motion regarding the first thirteen decrements as it determined they were directly or indirectly considered in the agency's decision making process. Respondent does object to including the Report because first, it was not directly or indirectly considered by the agency, and second, it is not proper extra-record evidence. The post-decision documents, Respondent argues, are relevant to the BCA's motion for preliminary injunction, which has since been denied.

4. Judicial review of an agency decision comes before the District Court as an appeal, and therefore it is confined to the record made before the agency. *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1028 (10th Cir. 2001) (*citing Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976)). "The focal point for judicial review should be the administrative record already in existence, not some new record made initially by the reviewing court." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (*citing Camp v. Pitts*, 411 U.S. 138, 142 (1973)). The complete administrative record consists of all documents and materials directly or indirectly considered by the agency. *Id*. The agency is entitled to a presumption of

administrative regularity with regard to the completeness of the record. *Wilson v. Hodel*, 758 F.2d 1369, 1372 (10th Cir. 1985) (*citations omitted*).

This presumption, however, is not determinative. "An agency may not unilaterally determine what constitute the administrative record, nor can an agency supplement it with post hoc rationalizations for its decision. *Bar MK Ranches*, 994 F.2d at 739–40. Additionally, the Tenth Circuit Court of Appeals has recognized, "[C]onsideration of extra-record materials is appropriate in "extremely limited" circumstances, such as where the agency ignored relevant factors it should have considered or considered factors left out of the formal record." *Lee v. United States Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (*citing American Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985)). The Tenth Circuit Court of Appeals has recognized a party may introduce extra-record evidence in the following limited situations:

> (1) that the agency action is not adequately explained and cannot be reviewed properly without considering the cited materials; (2) that the record is deficient because the agency ignored relevant factors it should have considered in making its decision; (3) that the agency considered factors that were left out of the formal record; (4) that the case is so complex and the record so unclear that the reviewing court needs more evidence to enable it to understand the issues; and (5) that evidence coming into existence after the agency acted demonstrates that the actions were right or wrong.

Am. Mining Cong., 772 F.2d at 626 (*internal citations omitted*) (*see also Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001)). "Although the contours of these exceptions are somewhat muddled, the Tenth Circuit has repeatedly recognized an exception when the record is deficient because the agency ignored relevant factors it should have considered in making its decision." *Wilderness Workshop v. Crockett*, No. 1:11-cv-1534-AP, 2012 WL 1834488 (D.Colo. May 21, 2012) (*internal citations omitted*).

5. The Court begins by noting, Petitioner does not argue Respondent acted in bad faith, engaged in improper behavior or failed to explain their decision, and Petitioner concedes that the agency did not consider the Report when it prepared the final environmental impact statement or the ROD. Pet'r Mem. 8 ("the agency somehow did not consider the Report when it prepared the FEIS or the ROD"). Thus, the presumption of administrative regularity of the record exists. Petitioner argues, the BLM ignored a relevant factor it should have considered in making its decision, and therefore the Report should be included as extra-record evidence under one of the limited exceptions recognized by the Tenth Circuit Court of Appeals. The Court agrees with Petitioner. After careful review of the Administrative Record and the Report, the court finds the extra-record evidence may aid the District Court in determining whether the agency violated NEPA as alleged by Petitioner in its Petition.

The Court acknowledges the Administrative Record already includes Species Assessment for Wyoming Pocket Gopher (*Thomomys Clusius*) in Wyoming by Dr. Gary P. Beauvais and Darby N. Dark-Smiley. This report was written one year earlier, by one of the same authors as the disputed Report. The Court notes, however, there are differences in depth and breadth between the reports. Respondent argues the inclusion of this earlier report, along with other references to the conservation issues concerning the Wyoming pocket gopher throughout the Administrative Record, are examples as to how the BLM did not ignore a relevant factor it should have considered in making its decision. At this stage in the proceedings, however, the Court is not to decide whether the BLM adequately considered the Wyoming pocket gopher conservation issues, for that is one of the ultimate decisions before the District Court in the BCA's Petition.

Instead, the Court must look to whether the Report should have been considered and whether it now should be included for the District Court's final determination. As Petitioner argues, the Report is the "relevant factor" itself, that the BLM failed to consider. The Court finds since the Report was presented to the BLM during the comments period, and goes into much more detail about the issues surrounding the Wyoming pocket gopher, the Report may be useful for the District Court to determine whether or not BLM failed "to take the required hard look at direct, indirect, and cumulative impacts to Wyoming pocket gophers . . . ." Pet. 4.

5. In conclusion, the Court shall allow the supplementation of the Administrative Record. The Court shall admit the Report under the exception of extra-record evidence because the agency ignored a relevant factor it should have considered in making its decision, the thirteen documents in Petitioner's Motion because they are unopposed, and the map to A.R. 40138– 50 (Resp't Ex. A) because it was inadvertently omitted. Additionally, the Court shall remove from the Administrative Record the documents that post-date the October 5, 2012 ROD.

NOW, THEREFORE it is ORDERED that the Administrative Record shall be supplemented with the Report (Pet'r Mot. Ex. 14), the thirteen agreed upon documents (Pet'r Mot. Ex. 1–13) and the map to A.R. 40138– 50 (Resp't Resp. Ex. A) that was inadvertently omitted from the Administrative Record;

It is FURTHER ORDERED that the documents that post-date the October 5, 2012 ROD shall be removed from the Administrative Record.

Dated this __14__ day of March, 2013.

Kelly H. Rankin
United States Magistrate Judge